In the Supreme Court of the United States

October Term 1979

No. 79-226

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

SCOTT WILLIAM K.,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
ROY C. PREMINGER,
Deputy Attorneys General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2179

Attorneys for Petitioner

Westside Law Publishers Santa Monica, California 213/451-1714

TOPICAL INDEX

Page

Opinions Below 2
Jurisdiction 2
Question Presented 2
Constitutional Provisions Involved 3
Statutes Involved 4
Statement Of The Case 5
A. Statement Of The Proceedings 5
B. Statement Of Facts Adduced At The Juvenile Court Hearing On Respondent's Motion To Suppress Evidence 6
Reasons Why A Petition For Writ Of Certiorari Should Be Granted 8

I.

The Ruling Of The California Supreme Court Impermissibly Infringes The Federal Constitutional Right Of Respondent's Parents To Care For, Discipline And Control Their Minor Child 8

II.

Article I, Section 13 Of The California Constitution Is Unconstitutional To The Extent That It Conflicts With A Federal Constitutional Right 12
Conclusion 13
Appendix A 15
Appendix B 32

TABLE OF AUTHORITIES

Cases	Page
Ginsberg v. New York (1968) 390 U.S. 629	9
In re Scott K. (1979) 24 Cal. 3d 395, 155 Cal. Rptr. 671, 595 P.2d 105	2
Meyer v. Nebraska (1923) 262 U.S. 390	9
Parham v. J.L. & J.R. (1979) ___ U.S. ___, 47 U.S.L. Week 4740	10
Pierce v. Society of Sisters (1925) 268 U.S. 510	9
Prince v. Massachusetts (1944) 321 U.S. 158	9
State v. Kinderman (Minn. S.Ct. 1965) 271 Minn. 405, 136 N.W.2d 577, cert. den. (1966) 384 U.S. 909)	11
Wisconsin v. Yoder (1972) 406 U.S. 205	9
Vandenberg v. Superior Court (1970) 8 Cal. App.3d 1048, 87 Cal. Rptr. 875	11

Statutes

California Health & Safety Code § 11359	1, 4, 5
California Health and Safety Code § 11359	1, 4, 5
California Welfare and Institutions Code § 602	4, 5
28 United States Code § 1257(3)	2

Constitutions

United States Constitutions	
Article VI Section II	3, 12
Amendment IV	3, 11
Amendment XIV	3
California Constitution	
Article 1 Section XIII	4, 8, 12

In the Supreme Court of the United States

October Term 1979

No. _____

KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

SCOTT WILLIAM K.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner Kenneth F. Fare respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding on May 25, 1979, reversing a judgment adjudicating respondent to be a ward of the juvenile court and placing him on probation in the home of his parents on various terms and conditions for having committed the crime of possession of marijuana for sale in violation of California Health and Safety Code section 11359.

OPINIONS BELOW

The majority, dissenting and concurring and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix A to this petition, are reported as *In re Scott K.* (1979) 24 Cal. 3d 395, 155 Cal. Rptr. 671, 595 P.2d 105. A copy of the opinion of the California Court of Appeal for the Second Appellate District, Division Four, reported and then vacated, which affirmed the order of wardship, is set forth as Appendix B to this petition, as well as a copy of the dissenting opinion.

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court under Title 28, United States Code section 1257(3), to review a judgment of the California Supreme Court which was entered on May 25, 1979, and became final on June 25, 1979. The present petition for writ of certiorari is filed within the required 90-day period following entry of final judgment. The instant judgment is a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution.

QUESTION PRESENTED

Does a parent have legal authority to consent to a police search of his minor child's personal property where said personal property is located in the parent's home, the minor child resides in the parent's home and is supported by the parent, and the parent has reasonable grounds to believe the minor child is engaged in criminal activity in the family home?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, section II:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

California Constitution, Article I, section XIII:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

STATUTES INVOLVED

At the time of the juvenile court proceedings herein, *i.e.*, prior to July 1, 1977, California Health and Safety Code section 11359 provided, in relevant part, as follows:

> "(a) Every person who possesses for sale any marijuana except as otherwise provided by law, shall be punished by imprisonment in the state prison for a period of not less than two years or more than 10 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison."

California Health and Safety Code section 11359 was amended effective July 1, 1977, and now reads as follows:

> "Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison."

California Welfare and Institutions Code section 602:

> "Any person who is under the age of 18 years

> when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent is a minor who was placed on probation in the home of his parents as a ward of the Superior Court of the State of California in and for the County of Los Angeles on December 8, 1976, following respondent's admission that he had possessed marijuana for sale in violation of California Health and Safety Code section 11359. This admission by respondent resulted in a finding by the Juvenile Court that respondent was a person described by section 602 of the California Welfare and Institutions Code.

On November 17, 1977, the Court of Appeal of the State of California, Second Appellate District, Division Four, one justice dissenting, affirmed the judgment in a published opinion. (Appen. B.)

Respondent's application to the California Supreme Court for a hearing was granted and on May 25, 1979, that Court in a divided opinion reversed the judgment on the ground that respondent's right to be protected against unreasonable searches and seizures superseded his father's rights to care for and discipline respondent and control his upbringing. (Appen. A.)

B. Statement of Facts Adduced at the Juvenile Court Hearing on Respondent's Motion to Suppress Evidence[1]

About one week before August 24, 1976, City of Los Angeles Police Department Narcotics Officer Sig Schian received an evidence report in which respondent was named. The report had been made after a police officer received a quantity of marijuana from respondent's mother, Mrs. Keene. (R.T. 2-3, 11-12.)[2] The evidence report stated that respondent's mother Mrs. Keene had removed the marijuana from a desk drawer in respondent's room in the Keene home. Mrs. Keene, due to the alarm generated by her converstaions with other parents in the neighborhood, believed that respondent might be dealing in marijuana. (R.T. 11-12.)

On August 24, 1976, about a week after he received the evidence report, Officer Schian telephoned respondent's father, Mr. Keene, and told him he intended to arrest respondent on a marijuana charge if respondent was at home. (R.T. 12.) Respondent's father told Officer Schian that respondent was in the garage working on his motorcycle and that he authorized the officer to arrest respondent there. Mr. Keene also asked Officer Schian to come into the house with respondent after he arrested him. (R.T. 3, 12.)

Shortly thereafter, Officer Schian, accompanied by

---

[1] After the juvenile court denied the motion to suppress evidence, respondent admitted the charge that he possessed marijuana for sale. (C.T. 3.)

[2] "R.T." refers to the Reporter's Transcript of the hearing on the motion to suppress evidence held on November 17, 1976. That transcript is physically part of the Clerk's Transcript on appeal, and is captioned "Motion Under 1538.5 P.C."

fellow officers, went to the open garage of respondent's house and there arrested respondent. (R.T. 4, 13.) At this time respondent said he guessed he was being arrested because of the "grass" his mother had turned in to the police. (R.T. 4.)

After arresting respondent, Officer Schian brought him to the house where the officer knocked at the door. Respondent's father Mr. Keene invited Officer Schian into the house. Officer Schian told respondent's father he had arrested respondent on the marijuana charge. Respondent's father expressed his concern as to what would happen to respondent. (R.T. 6, 13.)

Officer Schian indicated to respondent's father that additional contraband might be found in respondent's room in the house. The officer further indicated that to clear up the problem completely, he wished to search respondent's room. (R.T. 6.)

Respondent's father told Officer Schian that he had his permission to search respondent's room then and any time in the future, and in fact had his permission to search the entire residence any time the officer felt like it. Respondent's father further said that he was somewhat out of control of the situation and was thankful for the assistance of the police in helping him control respondent. (R.T. 6, 14.)

Officer Schian then searched respondent's bedroom. He discovered a toolbox on the floor in a corner of respondent's room. Respondent's father told the officer that the toolbox belonged to respondent. (R.T. 6, 8.)

Officer Schian observed that the toolbox was locked and he asked respondent's father for the key. Mr. Keene said he did not know where the key was. Officer Schian

then asked respondent where the key was. Respondent replied he had lost the key. Officer Schian told respondent that his father had given him permission to break the lock on the toolbox if the key could not be found. Officer Schian indicated he did not want to destroy the lock on the toolbox. He then asked respondent for his keys. Respondent took his keys out of his pocket and gave them to Officer Schian. The officer used one of the keys to open the toolbox and found nine one-ounce baggies of marijuana under a tray in the bottom of the toolbox. (R.T. 7, 9.)

Respondent's father, Mr. William Keene, testified for the defense that the toolbox was respondent's. Mr. Keene had never used the toolbox although on occassion he had borrowed tools from respondent. Mr. Keene further testified that he owned the residence where the toolbox was found by the police, that respondent lived in the home, had his own room there and did not pay rent or board. Mr. Keene is respondent's natural father and respondent has always lived with his father and mother. (R.T. 15-18.)

REASONS WHY A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE RULING OF THE CALIFORNIA SUPREME COURT IMPERMISSIBLY INFRINGES THE FEDERAL CONSTITUTIONAL RIGHT OF RESPONDENT'S PARENTS TO CARE FOR, DISCIPLINE AND CONTROL THEIR MINOR CHILD.

The majority of the California Supreme Court held in its opinion herein that respondent's right, apparently under Article I, section 13 of the California Constitution, to be

free from unreasonable searches and seizures was violated when a police officer pursuant to respondent's father's consent searched respondent's toolbox located in respondent's bedroom in the home of his parents. This holding by the majority of the California Supreme Court violates the right of respondent's parents to care for, discipline and control their minor child-a liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

Even where there is an invasion of protected freedom, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. (*Ginsberg v. New York* (1968) 390 U.S. 629, 638; *Prince v. Massachusetts* (1944) 321 U.S. 158, 170.) Furthermore, parents have powers greater than those of the state to curtail their minor child's exercise of the constitutional rights the child may otherwise enjoy, for a parent's own constitutionally protected liberty includes the right to bring up his children (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399), and to direct the upbringing and education of his children. (*Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535.) As against the state, this parental duty and right is subject to limitation only if it appears that parental decisions would jeopardize the health and safety of the child, or have a potential for significant social burdens. (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 234.) As noted by this Honorable Court in *Prince v. Massachusetts, supra* (1944) 321 U.S. 158, 166, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

As this Court also recently recognized, our jurisprudence historically has reflected Western Civilization

concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the state and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interest of their children. (*Parham v. J. L. & J. R.* (1979) ___ U.S. ___, 47 U.S.L. Week 4740, 4744.)

In the case at bench, respondent's father's in the exercise of his federal constitutional right as well as his moral duty and legal responsibility to control respondent's upbringing, consented to a police search of respondent's locked toolbox. Such action by respondent's father was eminently reasonable due to the circumstances that respondent's mother had already discovered marijuana in respondent's room in the family home — the room where the toolbox was subsequently located — and respondent's mother's discussions with other parents in the neighborhood established the substantial possibility that respondent was trafficking in marijuana. Clearly respondent's father's consenting to the police to search respondent's toolbox was not an action such as to jeopardize respondent's health and safety but rather was in respondent's best interest. Permitting a police officer to search a bedroom in the family home in order to determine if his son is using or trafficking in narcotics is a reasonable and necessary extension of a father's authority and control over his children's moral training, health and personal hygiene.

(*Vandenberg v. Superior Court* (1970) 8 Cal. App.3d 1048, 1055, 87 Cal. Rptr. 875, 880.) Therefore, the police officer who searched respondent's toolbox and seized the marijuana therefrom was justified in believing that respondent's father possessed legal authority to consent to the search of the toolbox. The search clearly was reasonable under the circumstances and did not violate respondent's rights under the Fourth Amendment. Respondent's privacy interest in the toolbox must yield under the circumstances to his father's superior federal constitutional right to control respondent's upbringing and provide for his best welfare.

Petitioner further submits that respondent's father had an absolute right to consent to the police search of respondent's toolbox since at the time of the search respondent was a minor, the toolbox was located in respondent's parent's home where respondent lived with his parents and respondent did not pay his parents any room or board. While a father's house may also be that of his child, if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the privacy rights of his children who live in his house. A minor child who lives in his parents' home, especially one such as respondent who pays his parents no room or board, does not have the same constitutional rights of privacy in the family home which he might have in a rented hotel room. In considering the reasonableness of a search of a home when the search is consented to by the father, the protection afforded to the minor child who lives in the home must be viewed in light of the father's superior right to waive it. (*State v. Kinderman* (Minn. S.Ct. 1965) 271 Minn. 405, 136 N.W.2d 577, 580, *cert. den.* (1966) 384 U.S. 909.)

If the opinion of the California Supreme Court in the present case is allowed to stand, parents will in many instances be legally precluded from preventing their children from engaging in criminal activity within the family home. Such a result would clearly endanger the welfare of many minors and the stability of families as a whole. As such, the decision of the California Supreme Court herein represents an example of sparing the rod and spoiling the child gone awry.

II.

ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION IS UNCONSTITUTIONAL TO THE EXTENT THAT IT CONFLICTS WITH A FEDERAL CONSTITUTIONAL RIGHT.

In the instant decision, the majority of the California Supreme Court apparently concluded that respondent's right under Article I, section 13 of the California Constitution to be free from unreasonable searches and seizures of the toolbox rendered unlawful the police search of the toolbox pursuant to respondent's father's consent. However, Article I, section 13 of the California Constitution is unconstitutional to the extent that it infringes upon or conflicts with respondent's father's authority to consent to the search of the toolbox in the exercise of his right under the due process clause of the Fourteenth Amendment to the United States Constitution to care for and discipline respondent and control his upbringing. (U.S. Const., Art. VI, § 2.)

Because of the conflict between petitioner's rights as interpreted by the California Supreme Court herein under Article I, section 13 of the California Constitution and

respondent's father's federal constitutional right as discussed above by petitioner, the opinion below is properly the subject of review by this Honorable Court on writ of certiorari.

CONCLUSION

For the foregoing reasons petitioner submits that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
ROY C. PREMINGER,
Deputy Attorneys General

Attorneys for Petitioner

In the Supreme Court of the State of California

Super. Ct. Juv. No. J 811544

Crim. 20361

In re SCOTT K., a Person Coming Under the Juvenile Court Law.

KENNETH F. FARE, as Acting Chief Probation Officer, etc.,

Plaintiff and Respondent,

v.

SCOTT K.,

Defendant and Appellant.

A 17-year-old defendant appeals from an order declaring him a juvenile court ward and placing him on probation. (See Welf. & Inst. Code, § 602.) The order was based on the court's finding that defendant unlawfully possessed marijuana for purpose of sale in violation of section 11359 of the Health and Safety Code. The question is whether a warrantless, parent-approved, police search of defendant's personal property was permissible.

Defendant's mother found marijuana in his desk drawer. She gave it to an off-duty police officer who lived in the neighborhood and told him that conversations with other

APPENDIX A

parents led her to believe that her son might be selling marijuana. A week later that officer's report was given to Narcotics Officer Schian for follow-up. He telephoned the father to advise that he was about to arrest defendant. The conversation was as follows: "In substance, I advised the father that I was in charge of the follow-up investigation of the marijuana that his wife had turned over to the police officer; that an arrest would result from this situation, arrest of the son; that I intended to come out and arrest his son if his son was home, and then I received the information that he was working on his motorcycle in the garage.

"And I asked him, 'Is it all right with you then that I go to the garage and arrest your boy there and do you wish to join us out there then, or what shall we do to make it easy on maybe the rest of the family?'

"And he indicated, 'Why don't you just come on inside after you have arrested him?' "

Without warrant, Schian and other officers went to the garage. Schian arrested defendant and took him to the house, where the father gave permission to search defendant's bedroom. The search disclosed a locked toolbox. The father told Schian that he had no key and that it was defendant's box. When asked about the key, defendant replied he had lost it. Schian said, "Your father already told me I could break the toolbox open if I couldn't find a key, but it's not in my interest to destroy the lock. Let me see the keys you have in your pocket." Defendant gave Schian his keys, one of which opened the box. Inside were nine baggies of marijuana.

The trial court ruled the arrest illegal for noncompliance with *People v. Ramey* (1976) 16 Cal.3d 263 because no exigent circumstances existed and there was sufficient time for the officer to secure an arrest warrant. The court

nonetheless denied a motion to suppress as evidence the marijuana found in the toolbox. It concluded that search of the box was independent from the arrest and was pursuant to a valid consent. The court reasoned that, because the father owned the house and had a duty to control his son's activities, he could permit the search at any time, whether or not his son was present or under arrest.[1]

After hearing the trial court's ruling, defendant admitted possessing marijuana for sale on the date of his arrest as charged and was adjudged a juvenile court ward. He contends on appeal that denial of his motion to suppress was erroneous. If so, he is entitled to withdraw his admission. (*People v. Hill* (1974) 12 Cal.3d 731, 767-769.)

The People contend that a father has authority to inspect the belongings of a minor child to promote the child's health and welfare; also, that in consenting to the search this father was "merely using the police as an instrumentality to assist him in complying with his parental duty."[2]

---

[1]These comments of the trial judge are pertinent:

"I find that the father . . . because of the evidence elicited as relates the relationship vis-a-vis the father, the minor and the home, had the right to conduct a search through whatever means were efficacious of the entirety of his own home and anything therein contained, whether placed there by his son or any other person; that it is not an overextension of the father's rights to use the instrumentality of the Narcotics Division of the Los Angeles Police Department to assist him in doing so.

"[T]he possessory rights to the contents of the entirety of the home . . . are at least joint possessory rights residing equally with the father and the minor. . . ."

[2]The people appear to confuse search by a private party with a warrantless police search validated by third-party consent. The marijuana that defendant's mother found appears to have been the

The formulation of issues in both the trial court's ruling and the People's argument seems misleading. Is not an important distinction obscured — the distinction between the parent-child relation and a constitutionally prescribed relation between people and government? A minor's interest in both those relations is identifiable even when, as here, his or her assertion of privacy rights against the government appears to conflict with parental authority. The primary issue in this case involves the minor's rights regarding his government.

SEARCH AND SEIZURE

Article I, section 13 of the California Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

We are assisted when we interpret those words by United States Supreme Court opinions on the federal Constitution's Fourth Amendment, which of course prescribes minimum standards that may not be violated.[3] That court apparently has not yet considered the Fourth

product of search by a private party. But the baggies found in the toolbox were the product of a search initiated and conducted by the police. Defendant's father did not search; nor did he ask the police to search. Rather he consented to a request that the police be permitted to search.

[3]"This court has always assumed the independent vitality of our state Constitution. In the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion." (*People v. Brisendine* (1975) 13 Cal.3d 528, 548.)

Amendment in a juvenile context. Further, the justices seem to have been reluctant to define the "totality of the relationship" of minors and the state. (*In re Gault* (1967) 387 U.S. 1, 13; *Carey v. Population Services Intern.* (1977) ____ U.S. ____.) Minors are, however, " 'persons' under our Constitution possessed of rights that governments must respect."[4] (*Tinker v. Des Moines School District* (1969) 393 U.S. 503, 511.) Fourth Amendment protection may be inferrable from the court's recognition of minors' rights to privacy; *e.g.,* a state may not condition a minor's decision to have an abortion on parental consent (*Planned Parenthood of Central Missouri v. Danforth* (1976) 428 U.S. 52); nor may it because of youth restrict one's access to contraceptives (*Carey v. Population Services Intern, supra,* ____ U.S. ____). Contraceptives are property, inherently personal. Since *Carey* prevents the state from restricting access to that property, it may indeed also protect the minor from arbitrary search and seizure once the property is obtained.

[4]Minors are "entitled to constitutional protection for freedom of speech, *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); equal protection against racial discrimination, *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); due process in civil contexts, *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); and a variety of rights of defendants in criminal proceedings, including the requirement of proof beyond a reasonable doubt, *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the prohibition of double jeopardy, *Breed v. Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975), the rights to notice, counsel, confrontation and cross-examination, and not to incriminate oneself, *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), and the protection against coerced confessions, *Gallegos v. Colorado,* 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *Haley v. Ohio,* 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948)." (*Carey v. Population Services Intern., supra,* ____ U.S. ____, 97 S.Ct. 2010, 2020, fn. 14.)

By no means are the rights of juveniles coextensive with those of adults. (See *In re Roger S.* (1977) 19 Cal.3d 921, 928.) Minors' rights are often legitimately curtailed when the restriction serves a state's interest in promoting the health and growth of children. (See *Prince v. Massachusetts* (1944) 321 U.S. 158, 168-170; *Ginsberg v. New York* (1968) 390 U.S. 629, 638.) In juvenile court proceedings rights may not be asserted if they might disrupt unique features of the proceedings; for example, jury trial is not required. (*People v. Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274.) Search and seizure laws, however, hardly seem disruptive or otherwise inconsistent with the state's interest in child welfare. It is established that minors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty. (*In re Gault, supra,* 387 U.S. 1; *Goss v. Lopez* (1975) 419 U.S. 565, 574; *In re Winship* (1970) 397 U.S. 358, 367; *In re Roger S., supra,* 19 Cal.3d 921; *In re Arthur N.* (1976) 16 Cal.3d 226.) Enforcement of search and seizure protections helps ensure that the factfinding process conforms with standards of due process.

Justice should not be compromised by well-intentioned aims to correct transgressing youths, and the rehabilitative value of treating juveniles with fairness must not be underrated. (*In re Gault, supra,* 387 U.S. 1, 18, 26, 51-52; *In re Roger S., supra,* 19 Cal.3d 921, 930.) Among sister states the extension of Fourth Amendment protections to minors is widespread.[5] California Courts of

[5] See for example judicial extension of those protections to juveniles in *State v. Lowry* (1967) 95 N.J. Super. 307, 313-317, 230 A.2d 907, 910-912; *In re Williams* (Ulster Cty. Fam. Ct. 1966) 49 Misc.2d 154, 169-170, 267 N.Y.S.2d 91, 109-110; *In re Morris* (Columbiana City C.P., Juv. Div. 1971) 29 Ohio Misc. 71, 278 N.E.2d 701, 702; *In re Harvey* (1972) 222 Pa. Super. 222, 229, 295 A.2d 93, 96-97; *Ciulla v. State* (Tex. Civ. App. 1968) 434 S.W.2d 948, 950.

Appeal have correctly, we believe, assumed that juveniles do enjoy the rights pronounced in *People v. Cahan* (1955) 44 Cal.2d 434, and thus have focused their inquiries on whether the search in question was reasonable.[6] Only recently we endorsed that assumption *sub silentio. (In re Tony C.* (1978) 21 Cal. 3d 888.)

The minor here contends that, because the toolbox was his own property, warrantless police search violated both his right to privacy and his right to be free from unreasonable search and seizure. He was age 17, old enough to assert his rights. When the police asked him for the key he did not consent to the search; instead the father gave consent.

Though the record discloses some discord in the parent-child relation, no evidence suggests that the discord concerned control of the box. The facts rather support the son's claim that the box was his own.[7] His constitutional rights were at stake; and we need only consult the words of Article I, section 13 of the California Constitution to see

A number of states have statutes that give juveniles the same fourth amendment protection as adults. See Uniform Juvenile Court Act, section 27, subdivision (b) (1968) and state statutes cited in Levitt, *Preadjudicatory Confessions And Consent Searches: Placing The Juvenile On The Same Constitutional Footing As An Adult* (1977) 57 B. U.L. Rev. 778, 781, footnote 24.

[6] *In re Joseph A.* (1973) 30 Cal. App.3d 880, 883-884; *In re Robert H.* (1978) 78 Cal. App.3d 824; *In re Christopher W.* (1973) 29 Cal. App.3d 777; *In re Fred C.* (1972) 26 Cal. App.3d 320; *In re Donaldson* (1969) 269 Cal. App.2d 509.

[7] The father told the police that the box belonged to his son. It was locked and the son had the key. The father later testified that the son obtained the box from a father-in-law and, though he (the father) had borrowed tools, he had never opened the box himself but always obtained the tools directly from the son.

that its protection applies.[8]

PARENTAL CONTROL AND MINORS' RIGHTS

The People argue that, because a parent is responsible for minor children and may himself inspect their property, police search of that property when pursuant to parental consent is reasonable and accordingly constitutional. Implicit is the notion that the father here could effectively waive his son's right to be secure in the son's effects. We reject that view.

In *Planned Parenthood of Central Missouri v. Danforth* (1976) 428 U.S. 52 the United States Supreme Court rejected the argument that parental authority should prevail over a minor's decision to terminate pregnancy. "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to become pregnant." (*Id.* at p. 75.)

This court has insisted that a minor's due process right be protected even when the right imposes a burden on parents or limits parental control. (*In re Ricky H.* (1970) 2 Cal.3d 16; *In re Roger S., supra,* 19 Cal.3d 921.) In *Ricky H.* the trial court's decision accepting a minor's waiver of the right to counsel was reversed because the waiver was influenced by the fact that the nonindigent parents were obliged by statute to pay counsel fees. *Roger S.* held that,

[8]Though the trial court discussed the minor's expectation of privacy we need not do so. Most often the expectation-of-privacy test has been applied in circumstances where words of the Constitution are not clearly applicable. (See, *e.g., Burrows v. Superior Court* (1974) 13 Cal.3d 238 (seizure of individuals bank records).) Search and seizure laws protect privacy, but the "protections go further, and often have nothing to do with privacy at all." (*Katz v. United States* (1967) 389 U.S. 347, 350.)

regarding admission to a mental hospital, a minor of 14 years or more possesses due process rights that may not be waived by the parent or guardian. It would be incongruous to conclude that parents, for good reason or no reason, may summarily waive their child's right to search and seizure protections.

THIRD PARTY CONSENT TO SEARCH

Our final question is whether the toolbox search was reasonable because the father's consent qualified under the third-party-consent exception to warrant requirements. A warrantless search is reasonable when consent is granted by one who has a protectible interest in the property. Valid consent may come from the sole owner of property or from "a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (*United States v. Matlock* (1974) 415 U.S. 164, 171.[9])

California case law prior to *Matlock* is consistent with that "common authority" principle. Third-party-consent searches were held invalid in *People v. Cruz* (1964) 61 Cal.2d 861, 866-867 (apartment guests could not consent to search of property of others jointly residing there); *People v. Murillo* (1966) 241 Cal. App.2d 173, 176-180 (roommate's consent to search residence was not a valid

[9]As explained by the court, "[c]ommon authority is . . . not to be implied from the mere property interest a third party has in the property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." (415 U.S. at p. 171, fn. 7.)

consent to search attache case); *People v. Egan* (1967) 250 Cal. App.2d 436 (stepfather's consent invalid for search of adult stepson's personal effects though they were located in bedroom of stepfather's home); *People v. Daniels* (1971) 16 Cal. App.3d 36 (mother could not consent to search of adult son's suitcase in her home).

The trial court here held that the father's authority was based on the combined circumstance of his ownership of the home and his duty to control his son. Yet neither fact shows the requisite link between the father's interest and the property inspected. Common authority over personal property may not be implied from the father's proprietary interest in the premises. (*United States v. Matlock, supra,* 415 U.S. 164, 171, fn. 7.) Neither may it be premised on the nature of the parent-child relation.[10]

Juveniles are entitled "to acquire and hold property, real and personal" (*Estate of Yano* (1922) 188 Cal. 645, 649); and "a minor child's property is his own . . . not that of his parents." (*Emery v. Emery (1955) 45 Cal.2d 421, 432; see also Civ. Code,* § 202.) Parents may have a protectible interest in property belonging to children, but that fact may not be assumed. When a warrantless search is challenged the People must show that it was reasonable. Here the People did not establish that the consenting parent had a sufficient interest under search and seizure

[10]Courts have not previously embraced the notion that the government can use the relationship between parties to impute "common authority" to the consenting party when none in fact existed. (*Cf. People v. Daniels* (1971) 16 Cal. App.3d 36; *People v. Murillo* (1966) 241 Cal. App.2d 173; also see dictum in *People v. Terry* (1970) 2 Cal.3d 362, 392, where this court held the wife could give valid consent to police search of her husband's property because "[t]here is no evidence that the murder weapon was in a sealed box or other container belonging to Terry (the husband), which Mrs. Terry might not have had authority to permit to be searched."

law. The father claimed no interest in the box or its contents. He acknowledged that the son was owner, and the son did not consent to the search. Because those facts were known to the police there was no justification either for their relying on the father's consent to conduct the search or for their failure to seek the warrant required by law.

The trial court's order is reversed.

NEWMAN, J.

NEWMAN, J.

WE CONCUR:

BIRD, C.J.
TOBRINER, J.
MOSK, J.
MANUEL, J.

In re Scott K.
Crim. 20361

DISSENTING OPINION BY CLARK, J.

Scott's right under the California Constitution to be free from unreasonable searches and seizures was not violated when his father and mother enlisted police assistance in discharging their parental responsibilities and consented to the search of Scott's toolbox. But his parents' right to care for, discipline and control their minor children — a liberty interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution — is violated by the decision reached by this court's majority today.

Admittedly, minors as well as adults possess constitutional rights. (*Planned Parenthood of Cent. Mo. v. Danforth* (1976) 428 U.S. 52, 74.) However, as the majority concede, the rights of minors are by no means coextensive with those of adults. (*Ante,* p. ____.[1]) In particular, the right to be free from unreasonable searches and seizures does not extend as far when a minor is involved. (*In re Christopher W.* (1973) 29 Cal. App.3d 777, 780.)

"[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' " (*Ginsberg v. New York* (1968) 390 U.S. 629, 638; *Prince v. Massachusetts* (1944) 321 U.S. 158, 170.) Moreover, parents have powers greater than those of the state to curtail a child's exercise of the constitutional rights he may otherwise enjoy, for a parent's own constitutionally protected liberty includes the right to "bring up children" (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399), and to "direct the upbringing and education of children" (*Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535). (*In re Roger S.* (1977) 19 Cal.3d 921, 928.) As against the state, this parental duty and right is subject to limitation only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 234.)

[1]Majority opinon, page 7.

By bringing Scott's possession and possible sale of marijuana to the attention of the authorities, and by cooperating with them in the investigation of these offenses, Scott's parents certainly did not jeopardize his health or safety, nor did their actions "have a potential for significant social burdens." Quite the contrary. However, the majority's decision very likely will have such deleterious effects by diminishing the authority of parents to discipline and control their children.

The issue presented by this case was correctly analyzed in the majority opinion prepared for the Court of Appeal by Justice Kingsley. "There is a strong public policy protecting the interest of a parent in the care, discipline and control of a minor child. A parent who, as in this case, has reasonable grounds to believe that a minor child is engaged in serious criminal activity, must be allowed to investigate that belief, in order to determine the proper discipline and corrective action to be taken. If that investigation involves the search, with or without the minor's consent, of locked items, the search is justified as conduct in aid of the parental power of care and discipline. It follows that, if the father in this case had himself opened the toolbox, or if the father, exerting his parental authority, had secured the key from the minor and then opened the

box, the search would have been lawful. That conclusion is supported by the cases involving searches of locked containers by school authorities. (*In re Christopher W.* (1973) 29 Cal. App.3d 777 [105 Cal. Rptr. 775]; *In re Fred C.* (1972) 26 Cal. App.3d 320 [102 Cal. Rptr. 682]; *In re Donaldson* (1969) 269 Cal. App.2d 509 [75 Cal. Rptr. 682].) If the *loco parentis* status of a school official permits a search of a locked container in order to protect against and prevent violations of the criminal laws, a fortiori, a parent has an equal right.

"The minor argues, however, that if the father, instead of securing the key himself and using it himself, involves a police officer in the process, the search thereby becomes tainted. We reject that theory. The material fact is not who actually secured the key and used it, but under whose authority the key was obtained and used. The record before us makes it clear tht the authority here was that of the father. The police made it clear that they would not search the box unless the father consented; they acted only on that consent. What the father could do himself, he could do by an agent, whether that agent be a locksmith or a policeman." (See also *In re Fred C.* (1972) 26 Cal. App.3d 320 (when high school student physically resisted a reasonable search of his pockets by vice principals, the school authorities were justified in having the search conducted by a police officer).)

The reasoning of the Court of Appeal is supported by *Vandenberg v. Superior Court* (1970) 8 Cal. App.3d 1048, a decision the majority of this court fail to mention. The petitioner in *Vandenberg,* like Scott, was a minor "living with his father, in the father's home, and subject to the ordinary rules regulating the relationship of parent and minor child." (8 Cal. App.3d at p. 1054.) A deputy sheriff went to the Vandenberg residence, advised the father he

was conducting a narcotics investigation, and received the father's permission to enter the home. After demonstrating to the father that his son had puncture wounds on his arms possibly indicative of narcotics usage, the deputy asked for the father's permission to search the house for narcotics. The father consented, despite the son's objection. In searching the bedroom jointly occupied by the father and son, the deputy found a paper containing a substance resembling heroin hidden among some towels.

The Court of Appeal held: "[A] father may grant permission to enter and search a bedroom jointly occupied by the father and his son and such consent is valid although the son may protest the search." (8 Cal. App.3d at p. 1055.) Explaining its decision, the court stated: "In his capacity as the head of the household, a father has the responsibility and authority for the discipline, training and control of his children. In the exercise of his parental authority a father has full access to the room set aside for his son for purposes of fulfilling his right and duty to control his son's social behavior and to obtain obedience. [Citation.] Permitting an officer to search a bedroom in order to determine if his son is using or trafficking in narcotics appears to us to be a reasonable and necessary extension of a father's authority and control over his children's moral training, health and personal hygiene." (*Id.*)

The judgment should be affirmed.

CLARK, J.

In re Scott K.
Crim. 20361

DISSENTING OPINION BY RICHARDSON, J.

I concur in part and respectfully dissent in part. On the one hand, parents, in my view, have both the right and the responsibility to preserve the lawful nature of activities in their home. Both generally, as law-abiding citizens, and particularly, as model-setting parents, their obligation, assuredly, is to control and eliminate any criminal activity in the home. Children in a home setting are more than tenants at will of the rooms which they occupy, and a parent is more than a landlord. On the other hand, a minor child no less than an adult retains substantial Fourth Amendment rights, but I do not view these as absolute or unconditional in a home environment.

How may we reconcile the seemingly conflicting interests and obligations? The Fourth Amendment proscription against "*unreasonable*" searches and seizures provides the key. I would hold that a minor child living in a home situation is not powerless before an unrestricted exploratory police search even though undertaken with parental consent. However, both the child's Fourth Amendment and privacy rights are not unrestricted. Bearing in mind the dual relationships involved herein, namely, the minor-citizen versus the officer-state invoking Fourth Amendment rights, and the private parent-child familial relationship, I would adopt the following principles. A parent may validly consent, over the objection of his dependent minor child living in the family home, to a police search of the premises and possessions used or owned by the child on the premises, if reasonable grounds (not necessarily amounting to a probable cause) support a belief that the place or thing searched will yield criminal

evidence. In this situation I would not elevate a child's Fourth Amendment or privacy rights above a parent's right to maintain a lawful, stable home environment free from criminal activity. The minor has no "reasonable expectation of privacy" in these limited circumstances where the police act reasonably in good faith reliance on the parents' consent.

The evidence here clearly supports the instant search. Scott's parents had already discovered marijuana in his room. Their own discussions with other parents established the substantial possibility that Scott was trafficking in the substance. On that basis, they initiated contact with the police. After further independent investigation, the authorities became convinced there was probable cause for Scott's arrest. Detective Schian, one of the arresting officers, testified he told the parents that a search of Scott's bedroom was the best way to prove or disprove Scott's involvement. This was reasonable. The parents had a legitimate purpose in seeking to ferret out the existence of any criminal activity conducted in any part of their home. Their responsibility to themselves, and as parents of Scott and of any other children in the family required that they do so. Parents in certain situations have a right to be suspicious, and to act reasonably in accordance with those suspicions. They do not help their children if they do otherwise. A locked container controlled solely by the suspect minor and found in his room would, of course, be one of the most logical places for concealment of contraband or criminal evidence.

Under the foregoing conditions, I would not recognize a child's right of "sanctuary" vis-a-vis the responsible parent. I therefore conclude that the search was proper, and that the judgment should be affirmed.

RICHARDSON, J.

In the Court of Appeal
State of California
DIVISION FOUR

2 Crim. No. 30369

(Super. Ct. Juvenile No. J-811, 544)

In the Matter of SCOTT WILLIAM K.,
A Person Coming Under the Juvenile Court Law,

Appellant,

v.

KENNETH F. FARE,

Respondent.

APPEAL FROM AN ORDER OF THE SUPERIOR COURT, LOS ANGELES COUNTY.
ROBERT H. LONDON, JUDGE.
AFFIRMED.

Wilbur F. Littlefield, Public Defender, Harold E. Shabo, Kenneth I. Clayman, Michael Allensworth, Albert J. Menaster, Deputy Public Defenders, for Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Roy C. Preminger, Deputy Attorneys General, for Respondent.

APPENDIX B

A minor appeals from an order finding him to be a person coming under section 602 of the Welfare and Institutions Code, adjudicating him a ward of the court, and placing him on probation. We affirm the order.

The petition alleged that the minor came under section 602 in that he possessed marijuana for the purpose of sale, in violation of section 11359 of the Health and Safety Code. The evidence before the trial court showed the following:

Shortly prior to August 24, 1976, the minor's mother found in the minor's desk drawer a quantity of marijuana. She delivered that marijuana to the police, informing them that she feared her son was selling marijuana. On August 24, 1976, Officer Schian telephoned the minor's father to tell him that he was about to arrest the boy. The officer's testimony was as follows:

> "In substance, I advised the father that I was in charge of the follow-up investigation of the marijuana that his wife had turned over to the police officer; that an arrest would result from this situation, arrest of the son; that I intended to come out and arrest his son if his son was home, and then I received the information that he was working on his motorcycle in the garage.
>
> "And I asked him, 'Is it all right with you then that I go to the garage and arrest your boy there and do you wish to join us out there then, or what shall we do to make it easy on maybe the rest of the family?"
>
> "And he indicated, 'Why don't you just come on inside after you have arrested him?' "

Pursuant to that telephone call, Officer Schian and two other officers went to the garage and arrested the minor.

The minor immediately remarked, without questioning, "I guess you're arresting me because of my grass that my mother turned in to the police in the street." The officer then took the minor into the house and received permission to search the minor's room. That search disclosed a locked toolbox. With the father's consent, using a key obtained from the minor, the officers opened the toolbox and found therein a quantity of marijuana. After that marijuana was found, the minor, after having been advised of his *Miranda* rights, said, "I bought a pound of marijuana. This is the first time I've ever been dealing."

The trial court held that the arrest was illegal and suppressed the minor's inculpatory statements, but it denied a motion to suppress the marijuana found in the toolbox. We conclude that the trial court did not err in refusing to suppress the marijuana.

I.

We need not, and do not, determine whether the trial court correctly determined that the arrest of the minor was illegal. The adjudication was based only on the evidence which the trial court did not suppress — *i.e.,* the marijuana found in the minor's tool box. But the investigation that led to that discovery was not the fruit of the arrest but was the result of the mother's statements to the police and the father's willingness to permit the police follow-up investigation of that statement.

II.

It is not contended that the entry into the house, after the arrest of the minor, was not with the full consent of the father nor that the search of the room was also with his consent. The contention here made is that the father had no right to consent to opening and searching the toolbox.

We hold that that search was lawful and the marijuana therin discovered properly introduced in evidence.

It is now settled that, if the son had been an adult, the father would have had no right to consent to opening and searching the locked toolbox. (*People v. Daniel* (1971) 16 Cal. App.3d 36.) The question before us is whether the constitutional right of a minor to privacy (Cal. Const., art. I § 1), operates to give him a similar right to privacy as against his parents. We conclude that it does not.

The right to privacy is not absolute; it yields in cases where some other public policy requires an invasion. Thus, in cases where the right of privacy was invoked to bar a legitimate publication of facts of public interest, the right has been held not to permit an action against a publisher (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469; *Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal. 3d 529, 541.) There is a strong public policy protecting the interest of a parent in the care, discipline and control of a minor child. A parent who, as in this case, has reasonable grounds to believe that a minor child is engaged in serious criminal activity, must be allowed to investigate that belief, in order to determine the proper discipline and corrective action to be taken. If that investigation involves that search, with or without the minor's consent, of locked items, the search is justified as conduct in aid of the parental power of care and discipline. It follows that, if the father in this case had himself opened the toolbox, or if the father, exerting his parental authority, had secured the key from the minor and then opened the box, the search would have been lawful. That conclusion is supported by the cases involving searches of locked containers by school authorities. (*In re Christopher W.* (1973) 29 Cal. App.3d 777; *In re Fred C.* (1972) 26 Cal. App.3d 320; *In re Donaldson* (1969) 269 Cal. App.2d

509.) If the *loco parentis* status of a school official permits a search of a locked container in order to protect against and prevent violations of the criminal laws, *a fortiori,* a parent himself has an equal right.

The minor argues, however, that if the father, instead of securing the key himself and using it himself, involves a police officer in the process, the search thereby becomes tainted. We reject that theory. The material fact is not who actually secured the key and used it, but under whose authority the key was obtained and used. The record before us makes it clear that the authority here was that of the father. The police made it clear that they would not search the box unless the father consented; they acted only on that consent. What the father could do himself, he could do by an agent, whether that agent be a locksmith or a policeman. A valid citizen's arrest is not rendered unlawful because the citizens enlists the aid of a police officer (who could not himself arrest) in order to subdue the arrestee. (*People v. Campbell* (1972) 27 Cal. App.3d 849, 853-854.) The same principle applies here.

The order is affirmed.

CERTIFIED FOR PUBLICATION.

KINGSLEY, J.

I concur:

FILES, P. J.

JEFFERSON (Bernard), J.

I dissent.

The majority holds that it did not need to concern itself with the question of whether the trial court correctly determined that the arrest of the minor was illegal since the trial court suppressed the minor's inculpatory statements and made its adjudication only on the evidence which it did not suppress, to wit, the marijuana found in the locked toolbox in the minor's bedroom. The majority then determines that the investigation that led to the discovery of this marijuana was not the fruit of the arrest but the result of the mother's statements to the police and the father's consent to the search.

I do not agree that the issue of the legality of the arrest can be sidestepped so neatly or easily. The discovery of the marijuana in the minor's locked toolbox is clearly the fruit of the minor's arrest. Since that arrest was illegal as correctly determined by the juvenile court, the subsequent search and seizure of the marijuana found in the toolbox must fall as the fruit of the poisonous tree. I therefore consider that the trial court erred in refusing to suppress the marijuana found in the toolbox. Thus, the minor's motion to suppress evidence, made pursuant to Penal Code Section 1538.5, should have been granted in its entirety.

Since the minor's arrest and the subsequent search of the toolbox were made without an arrest warrant or a search warrant, the burden was upon the prosecution to establish the legality of the arrest and the legality of the search. In this case it is the contention of the People that the warrantless arrest of the minor was based upon reasonable or probable cause and that the warrantless search of the toolbox was a valid search based upon a consent to search given by the minor's father.

I.

The Minor's Warrantless Arrest Was Illegal since the Arresting Officer Was Relying on Information from Another Officer not Produced as a Witness at the Suppression-of-Evidence Hearing.

Only two witnesses testified at the suppression-of-evidence hearing: Police Officer Sig Schian, produced by the prosecution, and William, the minor's father, called as a witness by the minor. It was conceded by the prosecution that Officer Schian effected the arrest of the minor without a warrant and, without a search warrant, made a search of the toolbox where marijuana was found. Officer Schian testified that he went to the minor's home and arrested the minor based upon information he had obtained from an evidence report. The evidence report was a written report which Officer Schian obtained from his superior in the police department. The written report set forth that the mother of the minor had contacted an off-duty police officer and had given to this officer a small amount of marijuana which the mother said she had removed from her son's desk drawer in his room; that she had had conversations with other parents in the neighborhood, and that such converstaions led her to believe that her son might be involved in marijuana dealing. Officer Schian testified that after receiving the written report from his superior officer, he made a telephone call to the father of the minor and advised that he was coming to the home to arrest the minor; that the father told him that the minor was working on his motorcycle in the garage and that the officer could go to the garage to effectuate the arrest and should then bring the minor into the home.

California Penal Code section 836 provides that a peace officer may, without a warrant, arrest a person whenever he has reasonable cause to believe that the person has committed a felony, whether or not a felony has in fact been committed.

"Reasonable cause" for arrest "exists when the facts known to the arresting officer 'would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.' [Citations.]" (*People v. Harris* (1975) 15 Cal. 3d 384, 389.)

But when the facts known to the *arresting* officer are based upon information received by him from *another* police officer, California law requires that the existence of reasonable cause to make a warrantless arrest must be based upon the presence of reasonable cause in the *mind* of the *police officer-informant.* The decisional law, and the underlying rationale for it, we find discussed in some detail in *People v. Madden* (1970) 2 Cal. 3d 1017. The *Madden* court relies upon *People v. Lara* (1967) 67 Cal. 2d 365, which held that while an officer may make an arrest without a warrant based on information received from other police officers or through "official channels," the prosecution is required to establish, as part of its burden of proof in a warrantless arrest case, that the officer who originally furnished the information to the arresting officer, had reasonable cause *himself* to *believe* that the suspect had committed a felony.

The *Madden* court also approved the discussion in *Remers v. Superior Court* (1970) 2 Cal. 3d 659, 666, where it was stated that "[i]t is well settled that while it may be perfectly reasonable for officers in the field to make arrests on the basis of information furnished to them by other officers, 'when it comes to *justifying the total*

police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness.' [Citations.]" (Emphasis added.)

The *Lara, Remers,* and *Madden* cases thus require that the prosecution, in establishing the validity of the warrantless arrest of a defendant, must prove, in court, at the suppression-of-evidence hearing at which the validity of the warrantless arrest is to be determined, that the police officer who provided the initial information that led to the arrest had reasonable cause to believe that defendant had committed a felony. This was not done by the prosecution in the case at bench. Testimony from the arresting officer, Sig Schian, was offered, but no testimony was produced from the off-duty officer who allegedly got marijuana from the minor's mother and relayed the information to a superior officer who then relayed it to Officer Schian.

Since the prosecution failed to sustain its burden of proving the lawfulness of the warrantless arrest of the minor, the consequences of that arrest must be reviewed in the context of an initial instance of illegal police activity. The rule of law is clear that evidence acquired as the result of illegal police activity is to be excluded. This rule of exclusion is aimed at deterrence of such police conduct. (*Wong Sun v. United States* (1963) 371 U.S. 471.) It is true that not all such evidence is excludable *per se,* however. But "[o]nce a defendant establishes a relationship between evidence and unlawful police activity, the People must prove the taint [of illegality] was purged." (*People v. Superior Court (Keithley)* (1975) 13 Cal. 3d 406, 411.) There was no such proof by the People in the case at bench.

Proof that the information as to a suspect's involvement in criminal conduct was already in the possession of the

police, or was acquired from an independent source, has supported a determination of the removal of the taint of illegality from the evidence. (*Lockridge v. Superior Court* (1970) 3 Cal. 3d 166.)

Nothing offered by the prosecution in the case before us, however, leads to the conclusion that an "independent source" furnished evidence in this case; nor does the fact that the minor's father consented to the warrantless search of his home, after the minor's arrest, provided a sufficient basis for admission of the evidence obtained thereby — the marijuana found in the minor's locked toolbox. "The rule is clearly established that consent induced by an illegal search *or* arrest is *not* voluntary, and that if the accused consents immediately following an illegal entry or search, his assent is not voluntary because it is inseparable from the unlawful conduct of the officers. [Citations.]" (*Burrows v. Superior Court* (1974) 13 Cal. 3d 238, 251.) (Emphasis added.) The father's consent was induced by an illegal arrest of the minor to the same extent as if the consent had been that of the minor.

The failure of the prosecution to produce, at the suppression-of-evidence hearing held pursuant to Penal Code section 1538.5, the off-duty police officer who furnished information to a superior in the police department, who then provided the arresting officer with such information which furnished the basis of the minor's warrantless arrest, is fatal to the prosecution's burden of proving the validity of the minor's warrantless arrest and the subsequent warrantless search of his room and toolbox. Had the information-supplying officer been produced and given testimony at the suppression-of-evidence hearing, a result different from that which I reach herein might well have been mandated. But I consider that this court is compelled to follow the principles enunciated in *Lara,*

Madden and *Remers.* Nor can the plain and explicit language of Penal Code section 1538.5, subdivision (i), which governs a suppression-of-evidence hearing conducted in the superior court on a defendant's motion, be ignored. That subdivision provides that "[t]he defendant shall have the right to litigate the validity of a search or seizure *de novo* on the basis of the *evidence presented at a special hearing.*" (Emphasis added.)

II.

The Warrantless Arrest of the Minor Was Illegal Because Effected in a Garage of a Home Without Exigent Circumstances Being Present, Even Though the Minor's Father Gave to the Arresting Officer the Consent To Enter

The trial court was correct in holding that the police entry into the garage was illegal under *People v. Ramey* (1976) 16 Cal. 3d 263. The father's consent to the police entry into the garage, a part of the home, to effectuate a warrantless arrest is not sanctioned by *Ramey.* In my view the *Ramey* case holds that a warrantless arrest within the home is unreasonable per se unless there are exigent circumstances present to justify dispensing with the warrant requirement. It is urged, however, that *Ramey* also sanctions as valid a warrantless arrest in the home that is based upon a consent to enter. But the factual situation in *Ramey* was not one involving the question of a consent to enter; it involved solely the question of whether exigent circumstances were present to justify the warrantless arrest.

I recognize that *Ramey* contained a single reference to a

"consent to enter" as an exception to the general rule of invalidity of a warrantless arrest made in a home. As a *dictum* statement, with no discussion, it should *not* be considered as persuasive authority. The constitutional mandate against unreasonable searches and seizures and unreasonable arrests within a person's home is designed to safeguard the right to privacy and individual liberty. Allegiance to this constitutional principle of protection to the individual demands that police action be preceded by judicial authorization of an arrest warrant in the absence of a genuine emergency. To equate a "consent-to-enter" concept as being synonymous with exigent circumstances constitutes an unwarranted weakening of the constitutional right of an individual to be free from an unreasonable arrest and an unreasonable search and seizure.

If the policy in favor of requiring the police to obtain arrest and search warrants is to be considered as the essential undergirding bulwark to the constitutional proscriptions against unreasonable searches and seizures, it will constitute a hollow and weak underpinning if a consent to effectuate a warrantless arrest in the home is recognized as a valid substitute for emergency circumstances or a warrant of arrest.

The facts in the instant case demonstrate the need for rejecting the view of making a consent to enter a valid means of upholding a warrantless arrest within a citizen's home. There was no emergency involved here. Officer Schian had no reason to avoid the route of obtaining judicial authorization for the arrest and search by obtaining an arrest and search warrant. If a consent-to-enter approach is upheld, the *preferable* procedure of obtaining an arrest warrant will become the exception rather than the general rule. In a case such as that presented before us, police officers should not be offered the option of seeking to obtain a consent to enter. Rather, they should be

required to obtain a search warrant from the judicial branch of government.

III.

The Warrantless Search of the Minor's Toolbox Was Invalid Because his Arrest Was Invalid and the Father's Consent Could not Override the Minor's Lack of Consent.

The majority takes the view that the minor's father had the right to give consent to the arresting officer to open and search the toolbox which the father stated to the officer belonged to his son. The minor indicated unequivocally to his father and the officer that he did not give consent to the officer's request to search the locked toolbox. The majority refuses to recognize the minor's constitutional right to privacy and a constitutional right to be free from a warrantless search by a police officer of an item of personal property owned by the minor. The rationale of the majority is that a parent has the complete care, discipline and control of a minor child and the latter's personal property until that child reaches the magic age of adulthood — now 18 years of age. I do not consider this to be the law — although I recognize that the school authority cases such as *In re Christopher W., In re Fred C.,* and *In re Donaldson,* cited *supra,* by the majority, would tend to support this all-embracing concept.

It is to be noted that in the case at bench we are dealing with a 17-year old minor who has practically reached adulthood; he was 8 months away from his 18th birthday. To hold that a toolbox, which the father recognized as the personal property of the minor, is subject to the control of the parents, insofar as recognizing the authority of the father to give the police the right to search such a box

contrary to the minor's expressed lack of consent, is carrying the doctrine of parental control beyond the bounds of reason. Such a holding is contrary to the current trend in the law to recognize that minors have some fundamental constitutional rights which cannot be overridden by parents.

Thus, in *In re Roger S.* (1977) 19 Cal. 3d 655, the court recognized the significant trend of giving minors constitutional rights which cannot be waived by their parents by enunciating a holding imposing a limitation upon the right of a parent to have a minor committed to a state hospital. The court stated: "We have concluded that although the personal liberty interest of a minor is less comprehensive than that of an adult, and a parent or guardian not only may but must curtail that interest in the proper exercise of this obligation to guide the child's development, in the area of admission to a state hospital a minor of 14 years or more possesses rights which may not be waived by the parent or guardian. Among these rights is the right guaranteed under the Fourteenth Amendment to the United States Constitution, and article I, section 7(a) of the California Constitution, to procedural due process in determining whether the minor is mentally ill or disordered, and whether, if the minor is not gravely disabled or dangerous to himself or others as a result of mental illness or disorder, the admission sought is likely to benefit him." (*In re Roger S., supra,* 19 Cal. 3d 655, 661; fn. omitted.)

The *Roger S.* court also points out that the right of a minor to constitutional rights and protection, which necessarily affect parental control, has been reaffirmed by the United States Supreme Court. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess

constitutional rights." (*Planned Parenthood of Missouri v. Danforth* (1976) 428 U.S. 52, 74.)

Irrespective of the right of control possessed by a parent with respect to a minor of a lesser age, certainly a 17-year-old minor with adulthood being established at 18 years of age, should have individual control over an item of personal property belonging to him such as a toolbox, to object to a warrantless search by a police officer. A 17-year-old minor's constitutional right to be free from a warrantless search by a police officer of an item of personal property located in the minor's bedroom should *not* be subject to waiver by a consent to search, given by his parent, with *full knowledge* to the searching officer that the minor objects to the search.

In addition, the illegal warrantless arrest of the minor in his home vitiates the father's consent. The consent of the father under the circumstances here presented is as much the product of the illegal arrest as if the consent had been given by the minor. Any other result sanctions and encourages lawless activity on the part of the police in violation of the minor's constitutional right to be free from unlawful arrest, search and seizure.

IV.

In View of Evidence that the Minor Was Married, the Prosecution Failed to Sustain its Burden of Proving that Minor's Father Had Capacity to Consent to a Warrantless Search of Minor's Toolbox

In the case at bench, even if we were to assume that a parent of a 17-year-old minor has the legal right to give consent to a police search of the minor's personal property, over the objection of the minor made known to the police officer, the prosecution failed to sustain its burden of

proving that the father had the legal right to waive the minor's constitutional rights and give a valid consent to search.

The failure of the prosecution to sustain its burden of proof is manifest because evidence was introduced at the suppression-of-evidence hearing that the minor was married. The record reflects that the minor called his father, William, to testify in his behalf. The father testified that the toolbox belonged to the minor and that it had been given to the minor as a gift by the minor's "*father-in-law.*" This testimony remained undisputed on the record. The only reasonable inference that can be drawn from such testimony is that the minor was married. Section 204 of the Civil Code provides, in pertinent part, that "[t]he authority of a parent ceases: . . . " This section became a part of the Civil Code in 1872 and has not been amended. Section 204 has been interpreted as follows: "It is true that upon the marriage of a minor child, she is deemed to have been thereby emancipated from her parent's control, and that the parent's authority over her then ceases. [Citations.] It has been held that this is true even though a child under the age of statutory consent marries without the consent of their parents." (*Easterly v. Cook* (1934) 140 Cal. App.115, 121.) In similar fashion, it recently has been said: "Marriage of a minor child results in emancipation. (Civ. Code, § 204, subd. 2.) Such emancipation is *complete* . . . " (*Bryant v Swoap* (1975) 48 Cal. App.3d 431, 435.) (Emphasis added.)

The law is well established that when a search is conducted without a warrant, the burden is on the People to establish justification under a recognized exception to the warrant requirement. (*People v. Rios* (1976) 16 Cal. 351, 355.) A consent to search constitutes such an exception. (*People v. James* (1977) 19 Cal. 3d 99, 106; *People v. Michael* (1955) 45 Cal. 2d 751, 753.) Our high

court has recently fixed this burden of proof as one to be established by a preponderance of the evidence. (*James, supra,* 19 Cal. 3d 99, 106, fn. 4.)

It is significant that in fixing the burden of proof to be that of proof by a preponderance of the evidence, the *James* court made reference to the fact that in *Blair v. Pitchess* (1971) 5 Cal. 3d 258, 274, the court had indicated that the People had to establish the *fact of consent* by "clear and positive evidence." The *James* court stated that the *Blair* reference to "clear and positive" evidence was meant to emphasize the importance and distinctiveness of the burden of proving the fact of consent, even though that burden could be discharged by a preponderance of the evidence. (See *James, supra,* 19 Cal. 3d 99, 106, fn. 4.)

In view of *James,* the conclusion is compelling and inescapable that the People did not sustain its burden of proving a valid consent to search to overcome the warrant requirement. Evidence that the minor's father gave consent to the officer to search the toolbox that was owned by the minor is insufficient under the circumstances presented in the case at bench. Once the minor had produced evidence that tended to establish that he was emancipated by marriage, pursuant to section 204 of the Civil Code, the People's burden could not be said to be established simply by proof that William was the father of the minor who was living at home and that William gave *his* consent to the police officer to search the minor's toolbox. The fact of the *capacity* and *authority* of the consenting person to give consent to a search is as much a part of the prosecution's burden of proof as is the prosecution's burden to establish that consent by one authorized to give consent was the product of free will and not a mere submission to an express or implied assertion of governmental authority.

(See *James, supra,* 19 Cal. 3d 99, 106; *People v. Johnson* (1968) 68 Ca. 2d 629, 632.)

I would reverse the trial court's order denying the minor's motion to suppress the marijuana found in the toolbox.

JEFFERSON (Bernard), J.